No. 15,651

United States Court of Appeals

For the Ninth Circuit

AMERICAN RADIATOR AND STANDARD SANITARY CORPORATION, a Corporation,

Appellant,

vs.

L. L. FORBES and A. W. BODINE, Doing Business as L. L. FORBES CONSTRUCTION COMPANY, and THE HOME INDEMNITY COMPANY, a Corporation,

Appellees.

Appeal from the United States District Court for the District of Arizona.

BRIEF FOR THE APPELLANT.

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Home Indemnity Company is a corporation organized under the laws of the State of New York and is a citizen of that state. The defendant School District No. 205 is a body politic organized under the laws of the State of Arizona. The amount in controversy, exclusive of interest and costs, exceeds the sum of $3,000. These jurisdictional facts were established in the District Court by the allegations of the amended complaint (R. 4), which were not denied and were found by the Trial Court to be true (R. 22).

The jurisdiction of the District Court rested upon diversity of citizenship. 28 U.S.C. § 1332.

The District Court, sitting without a jury, made formal findings of fact and conclusions of law and entered its judgment in favor of the defendants who are appellees and against the plaintiff. The judgment being final, the present appeal is predicated upon the provisions of 28 U.S.C. § 1291.

STATEMENT OF THE CASE.

This is an action brought by the appellant American Radiator and Standard Sanitary Corporation (whom we may call American Radiator from time to time throughout this brief) to recover from the several defendants the sum of $10,493.13 as the unpaid balance of the purchase price of plumbing materials which it furnished for installation for the construction of classroom additions to Sunnyslope High School which is a part of the school system of the Glendale Union

High School District in Maricopa County, Arizona. The defendant members of the Board of Supervisors of the county and the School Board members, together with the District, were dismissed from the action upon their motion. No appeal was taken from this dismissal.

The action proceeded against the general contractors, L. L. Forbes and A. W. Bodine, doing business as L. L. Forbes Construction Company (to whom we shall refer in this brief either as Forbes or the Contractor) and The Home Indemnity Company (which we shall call the Bonding Company). There being no dispute between the parties with respect to any material issues of fact, except concerning the amount of damages, they entered into an agreed statement of facts setting forth such facts as were deemed necessary for a determination of the issue of liability of the remaining defendants and agreeing for the purpose of the cause that American Radiator had supplied some materials to the plumbing subcontractor which were incorporated in the classroom construction in question and that there was due and owing to American Radiator from the subcontractor a sum of money representing the purchase price of the materials and that American Radiator had never received payment from any person for such sum. The parties further agreed that there existed a disputed issue of fact concerning the description and purchase price of these materials (R. 14). By this stipulation the parties intended that the preliminary question of liability should first be decided by the court which would thus be relieved of the necessity of conducting an extended

accounting on the question of damages if the preliminary issue of liability were decided against the plaintiff.

Attached to the agreed statement of facts were the contract between Forbes and the School District and the contractor's bond issued by the Bonding Company. We have reproduced these two exhibits in the appendix to this brief.

The only other evidence before the court consisted of a notice to admit facts served by American Radiator and answered by Forbes (R. 18-19).

The parties submitted briefs and the court took the matter under advisement. On June 10, 1957, the court entered its order approving the defendants' findings of fact and conclusions of law and entering its judgment denying recovery to American Radiator against any of the defendants.

The facts material to the controversy are in substance as follows:

On September 30, 1954, Forbes, being the successful competitive bidder, entered into a contract with the School District for the construction of certain classroom additions to Sunnyslope High School. The contract was executed for the School District by the Board of Supervisors of Maricopa County acting as agent for the School District pursuant to the requirements of the Arizona statutes governing the letting of contracts for school construction. Under the Provisions of Article III of the contract, Forbes agreed to "provide and pay for all materials, labor, tools,

water, power and other items necessary to complete the work" (App. iv). Simultaneous with the execution of the contract and in compliance with the provisions of § 10-610 of the 1939 Arizona Code Annotated, Forbes furnished to the School District a contract bond with the Bonding Company as surety (App. xiii).

Forbes awarded the subcontract for the plumbing work to W. M. Bachman. In an effort to perform the subcontract, Bachman in turn purchased plumbing materials and supplies from American Radiator to install in the job. In due course Bachman completed his subcontract with Forbes and was paid in full by Forbes.

The construction of the classrooms was completed and formal notice of completion was filed with the Board of Supervisors on July 16, 1955. Two days later, on July 18, American Radiator sent a registered letter to the School District, to Forbes, to the Bonding Company and to Bachman notifying each of them that there was due to American Radiator $10,594.52 for plumbing materials which had been furnished for installation in the classrooms which were being built by Forbes for the School District. Each of the named addressees acknowledged having received the letter within five days. Although the precise amount of the sum of money which was due to American Radiator on July 16, 1955, is in dispute in this cause and remains for determination by the District Court, it is agreed that some sum of money was due to American Radiator on that date and that no payment has ever

been made to American Radiator by any person at any time on account of the balance due American Radiator.

Notwithstanding the registered letter from American Radiator putting the several addressees on notice that it had not been paid, the School District, through the Board of Supervisors, paid to Forbes the balance due on the general contract which had been retained for the 65-day statutory period after completion. This payment was made to Forbes, although Forbes had not (and in fact has never) furnished to the School District or the Board of Supervisors a satisfactory receipt from American Radiator for its bill for materials furnished by it for use in the construction of the classroom additions or a waiver of lien from American Radiator.

Since the facts relating to the issue of liability are not in dispute, the case presented to the District Court a pure and readily identifiable question of law. In essence, this question is whether, under the law of Arizona, a general contractor and his bonding company are liable to a supplier of materials to a subcontractor for school construction when

1. The general contractor has contracted in writing to provide and pay for all materials necessary to complete the work, and

2. The general contractor has accepted payment of the statutory retention fund without having furnished to the public authority any receipt or lien waiver evidencing payment for the materials, and

3. The general contractor has received prior actual notice that the material supplier has not been paid.

The District Court held that liability does not attach to the general contractor or his bonding company under these circumstances for the reason that neither the contractual undertaking of the general contractor nor the bond was in law a contract for the benefit of a materialman. It is our purpose by this brief to demonstrate that the law is otherwise.

SPECIFICATION OF ERRORS.

1. The District Court erred in not finding, in accordance with plaintiff's proposed additional findings of fact (R. 28), that the defendants L. L. Forbes and A. W. Bodine, dba L. L. Forbes Construction Company, never furnished to the Board of Supervisors of Maricopa County, Arizona, as agent for Glendale Union High School District, a satisfactory receipt from American Radiator and Standard Sanitary Corporation for its bill for materials furnished by it for use in the construction of classroom additions to Sunnyslope High School or a waiver of lien from American Radiator and Standard Sanitary Corporation, since the finding was supported by the record and was material to the determination of the issues of liability (R. 19).

2. The District Court erred in concluding, as it did in Conclusion of Law I (R. 25), that the contractual undertaking of the general contractor, the defendants

L. L. Forbes and A. W. Bodine, dba L. L. Forbes Construction Company, under the contract marked "Exhibit A" to the agreed statement of facts is not a contract for the benefit of a third party and confers no rights upon the plaintiff to sue thereunder.

3. The District Court erred in concluding, as it did in Conclusion of Law II (R. 25), that the defendants L. L. Forbes and A. W. Bodine, dba L. L. Forbes Construction Company, did not undertake any obligation under the contract to pay for plumbing materials and supplies sold by the plaintiff to the plumbing contractor W. M. Bachman.

4. The District Court erred in concluding, as it did in Conclusion of Law III (R. 26), that the defendants L. L. Forbes and A. W. Bodine, dba L. L. Forbes Construction Company, did not undertake any obligation towards the plaintiff by furnishing and becoming a party to the bond on which The Home Indemnity Company was surety.

5. The District Court erred in concluding, as it did in Conclusion of Law IV (R. 26), that the bond furnished by defendants L. L. Forbes and A. W. Bodine, dba L. L. Forbes Construction Company, gave no rights to anyone other than the obligee.

6. The District Court erred in concluding, as it did in Conclusion of Law V (R. 26), that the bond furnished by the defendants L. L. Forbes and A. W. Bodine, dba L. L. Forbes Construction Company, is an indemnity bond containing no provisions for the benefit of the plaintiff or persons in the plaintiff's position.

7. The District Court erred in concluding, as it did in Conclusion of Law VI (R. 27), that the defendants L. L. Forbes and A. W. Bodine, dba L. L. Forbes Construction Company, complied with all the provisions of § 10-610, Arizona Code Annotated, 1939, as amended (1952 Supplement).

8. The District Court erred in concluding, as it did in Conclusion of Law VII (R. 27), that, construing the contract, the bond and the statutes of the state of Arizona together, there is no legal obligation imposed on any of the defendants who are appellees to pay for materials purchased by W. M. Bachman from the plaintiff for installation in the classroom additions to Sunnyslope High School and that plaintiff has no legal right to recover from those defendants who are appellees for such materials.

SUMMARY OF ARGUMENT.

I.

Forbes contracted with the School District to provide and pay for all materials necessary to complete the work. Although the named obligee in the contract was the Board of Supervisors acting as agent for the School District, the contract in law was for the benefit of laborers and materialmen, including American Radiator. The overwhelming weight of authority gives to a materialman, whether he supplies direct to the general contractor or to a subcontractor, the right to sue upon a contract of the character here involved.

II.

The contractor's bond was given in purported compliance with the provisions of the applicable Arizona statute governing contracts for the erection of schools and other public buildings. The statute required the contractor to furnish a bond in the amount of the contract conditioned upon the faithful performance of the contract. Under the familiar rule that a bond furnished in accordance with a statute is deemed to contain the minimum undertakings required by the statute, the bond furnished by the Bonding Company was in law conditioned upon the faithful performance of Forbes' contract, whether it expressly so stated or not. Efforts on the part of the Bonding Company and Forbes to limit the obligation of the bond to the indemnification of the School District and to deny to laborers and materialmen the right to sue on the bond were void to the extent that they conflicted with the statute and Forbes' contract. The contract being for the benefit of third parties, including American Radiator, the liability of the Bonding Company is coextensive with that of the contractor and American Radiator is entitled to sue and recover on the bond.

III.

The Arizona statute governing contracts for the erection of public buildings required the Board of Supervisors to retain 10% of the contract price as a guarantee of the faithful performance of the contract and to release it to Forbes only upon his furnishing satisfactory receipts for all labor and materials, and,

in any event, not prior to 65 days from completion of the contract. Since American Radiator never was paid and never gave to anyone a receipt for materials furnished by it for installation in the School buildings, Forbes could not and in fact did not furnish any satisfactory receipt to the Board of Supervisors for such materials. Notwithstanding this failure on Forbes' part to comply with the statute, the Supervisors released the 10% retention fund to Forbes. The Board of Supervisors paid and Forbes received the fund in violation of the statute. Since the fund was held as a guarantee of the faithful performance of the contract, including the undertaking by Forbes to pay for all materials necessary for the work, it was impressed with a constructive trust in favor of all persons, including American Radiator, who were entitled to the benefits of Forbes' contractual undertaking.

ARGUMENT.

I.

FORBES' CONTRACT WITH THE SCHOOL DISTRICT TO PAY FOR ALL MATERIALS IS A CONTRACT FOR THE BENEFIT OF MATERIALMEN, INCLUDING AMERICAN RADIATOR, UPON WHICH THEY MAY SUE AND RECOVER.

Article 1 of the agreement of September 30, 1954, between Forbes and the Board of Supervisors acting for the School District contains the following covenant (App. ii):

> "The contractors shall furnish all of the material and perform all of the work. . . ."

Article 3 of the General Conditions which are expressly agreed to be a part of the contract provides as follows:

> "Article 3. Materials, Appliances, Employes—Except as otherwise noted, the *Contractor shall provide and pay for all materials,* labor, tools, water, power and other items necessary to complete the work.
>
> Unless otherwise specified, all materials shall be new, and both workmanship and materials shall be of good quality.
>
> All workmen and sub-contractors shall be skilled in their trades." (Emphasis supplied.)

Article 1 of the General Conditions makes it clear that the word "materials" as used in Article 3 was intended to embrace every kind of material necessary for the proper execution of the work. The pertinent language is as follows:

> "The intent of these documents is to include all labor, materials, appliances and services of every kind necessary for the proper execution of the work, and the terms and conditions of payment therefor."

It cannot be doubted that as between Forbes and the School District, he agreed to pay for materials of the character furnished by American Radiator to the plumbing subcontractor for incorporation in the Sunnyslope classroom additions. The only question presented in respect to the liability of Forbes under the contract is whether it is in law a third party beneficiary contract so that a materialman, such as

American Radiator, may sue and recover upon it, although it is not named as a party to the agreement. If the contract is for the benefit of third parties, including American Radiator, the judgment of the District Court in favor of Forbes must be reversed.

The jurisdiction of the court being predicated upon diversity of citizenship, the questions presented by this appeal must be decided with reference to the law of Arizona. If the courts of that state have not passed upon the issue definitively, it then becomes the task of this court to construct an Arizona rule from such pronouncements of its court as may provide a clue to the doctrine which would be adopted in Arizona if the question had been squarely presented. While we do not represent to this court that Arizona has expressly ruled on the issue at bar, we are persuaded by analogy that Arizona would rule for the materialman upon the facts presented by the record in this case.

The decision which most closely approximates the question now before the court is *Webb v. Crane Co.*, 52 Ariz. 299, 80 P. 2d 698. Crane Company furnished plumbing materials to a subcontractor to install in a state college building. Webb was the general contractor. After the work was completed, the plumbing subcontractor failed to pay Crane Company for the materials furnished by it. Crane sued Webb and his bonding company. One of the conditions of the bond filed by Webb was that the principal (Webb) pay all materialmen who supply materials, supplies or provisions for carrying on the work. Both the contract and the

bond named the State of Arizona as the sole obligee. Webb defended upon the ground that neither instrument was for the benefit of a third party materialman or gave him the right to sue thereon. The trial court found against both Webb and the bonding company. Only Webb appealed.

The Supreme Court of Arizona affirmed the judgment below. It based its reasoning primarily upon the proposition that since public buildings are not subject to liens, a remedy in lieu of the lien law was created by the requirement of a contractor's bond. The court expressly held that the bond was for the benefit of third parties, including the subcontractor's materialman, saying:

> "We are clearly of the view that the performance bond given by appellant was for the protection of those who labored or furnished material on the addition to Taylor Hall, as well as the obligee mentioned therein, and was, therefore, a third party bond. *Knight & Jillson Co. v. Castle,* 172 Ind. 97, 87 N.E. 976, 27 L.R.A. (N.S.) 573, and note VIII, page 588. The following excerpt from the annotation in 77 A.L.R., p. 83, is a correct statement of law:
>
> > " 'The right of laborers and materialmen to recover on a bond executed in connection with public works or improvements, where the bond contains a condition for their benefit and is intended for their protection, although the public body is the only obligee named therein, and there is no express provision that such third parties shall have any rights thereunder, is affirmed by the great weight of authority.' "

The only difference between *Webb v. Crane Co.* and the case at bar is that there the obligation to pay materialmen appeared in the bond, whereas here it appears in Forbes' contract, the faithful performance of which is guaranteed by the bond, as we shall later demonstrate. Let us consider whether this factual difference provides any basis for refusing to apply the rule of the *Webb* case. The holding of the *Webb* case is that a materialman to a subcontractor is a beneficiary of and may sue upon the undertaking of the general contractor as principal and his surety to pay all materialmen. The sole decision cited as support for the ruling of the Arizona court is *Knight & Jillson Co. v. Castle,* 172 Ind. 97, 87 N.E. 976. In that case Castle contracted with a church to construct a steam heating plant. His contract contained the following clause:

> "The parties of the second part (Castle) agree to pay for all labor and materials used in said work when due. . . ."

This promise is in all respects identical to Forbes' promise to "provide and pay for all materials . . . necessary to complete the work."

Castle furnished a bond conditioned upon his faithful performance of the contract. Castle became insolvent and defaulted in his obligation to a materialman who sued Castle and his surety. Both defended upon the ground that the church was the sole obligee in the contract and bond and a materialman had no right to sue and recover upon either instrument. The Supreme Court of Indiana held that the agreement of the contractor to pay for all labor and materials

used in the work was made for the benefit of materialmen who had the right to sue and recover upon the contract and upon the bond which guaranteed its faithful performance. The rule adopted by the court is concisely set forth in the following excerpt from the decision:

> "We have come to adopt two rules of construction with respect to undertakings of the character of the contract and bond sued on in this case, without, perhaps, noting carefully the distinctions in principle, as well as the distinctions between sureties and guarantors, as applied to the particular cases. One is that, where a contract is made primarily for the benefit of a third person, such agreement inures to the benefit of such person, even though the third person at the time had no knowledge of the agreement. The other is that *a contract to pay for labor or materials is a contract for the benefit of laborers and materialmen, and that upon default they may sue.*" (Emphasis supplied.)

Patently, the only essential differences between the *Knight & Jillson* case and the case at bar are (1) that Knight & Jillson Co. was a materialman to the general contractor, whereas American Radiator supplied a subcontractor, and (2) that the church was a private owner, whereas the School District is a public body.

In respect to the first difference, *Webb v. Crane* has resolved all doubts for Arizona by permitting a supplier of plumbing supplies to a subcontractor to recover as a third party beneficiary of the general contractor's bond. This conclusion is in accord with the

overwhelming weight of authority in other jurisdictions. The same question was before the Fourth Circuit Court of Appeals in *Standard Acc. Ins. Co. v. Simpson,* 64 F.2d 583. The court held both the contractor and his surety liable to a subcontractor's materialman, saying (at p. 589):

> "Each of the bonds, signed by the contractor as well as the surety, guaranteed that the contractor would 'pay when and as due all lawful claims for labor performed or materials and supplies furnished for use in and about the construction of said highway or highway structures'; and we do not see how the letting of a part of the work to a subcontractor could be held to absolve the contractor or the surety from the obligation so undertaken. The public authorities were interested in providing that those who furnished labor or materials for the construction of the highways should be paid for them; the bonds were taken for the purpose of guaranteeing that this would be done; the contractor could not have obtained the contracts without giving such bonds; and we do not think that, after they have been given and the contracts thereby obtained, laborers and materialmen, for whose protection they were required, should go unpaid because the work has been let to a subcontractor, who has given an inadequate bond and who proves to be insolvent. This has been expressly decided by the Supreme Court of the United States in suits instituted under the Hurd Act (40 USCA § 270). United States for Use of Hill v. American Surety Co., 200 U.S. 197, 26 S. Ct. 168, 50 L. Ed. 437; Mankin v. U. S. to Use of Ludowici-Celadon Co., 215 U.S.

> 533, 30 S. Ct. 174, 54 L. Ed. 315. *And the same rule is supported by the overwhelming weight of authority in other jurisdictions.* See exhaustive note in 70 A. L. R. 308 and cases there cited." (Emphasis supplied.)

The annotation in 70 A.L.R. has been supplemented in 111 A. L. R. 311.

The extension of protection to a subcontractor's materialman does not impose an unconscionable hardship upon the general contractor since he can readily protect himself by requiring his subcontractor to give a bond for the payment of laborers and materialmen. See *United States Use of Hill v. American Surety Company,* 200 U. S. 197, 50 L. Ed. 437, 26 S. Ct. 168; *City of Portland v. New England Casualty Co.,* 78 Ore. 195, 152 Pac. 253.

Actually, the decision of the District Court does not rest upon the distinction between materialmen to subcontractors and those furnishing directly to the general contractor. Conclusion of Law No. I holds unqualifiedly that the contract is not a contract for the benefit of a third party (R. 25). Presumably, this holding would similarly exclude from the benefits of the contract a materialman who supplied materials direct to Forbes. The cases supporting this narrow view are rare indeed.

The second distinction, namely that Forbes' contract was for a public building, actually favors recovery to American Radiator. A materialman's lien cannot be asserted against a public building. *Webb v. Crane,*

supra. A body politic and its officers are immune to liability for the non-payment of materialmen and laborers. As a consequence, the named obligee in a public contract and bond needs no protection. If, therefore, the undertaking of the contractor to pay for materials and labor is construed only as an obligation running to the public body, it is wholly meaningless and it is ordinarily not the policy of the law to construe agreements so that they will be wholly meaningless. Since the only class of persons who require protection are the materialmen and laborers, the contract will be construed to be intended for their benefit. This is the reasoning of the Supreme Court of Iowa in *Hipwell v. National Surety Co.,* 130 Iowa 656, 105 N. W. 318, 319:

> "It is stipulated in the agreement 'that the party of the second part further covenants and agrees to promptly pay for all labor and materials used in and about the building, and to hold and save the said first party harmless from and against all and every demand, or demands, of any nature or kind, for and on account of liens for labor and materials, or of the use of any patented invention, article or appliance included in the materials hereby agreed to be furnished under this contract.' In no plainer language could the contractor have agreed 'to promptly pay for all labor and materials used in and about the building.' This cannot be regarded as merely introductory to what follows, as no liens for labor and material could in any event be asserted against the municipality, and such a construction would destroy the meaning of the entire paragraph, save the por-

> tion relating to patented inventions and the like. Who then were to be paid? Manifestly those furnishing the labor and materials. The provision was for their benefit. No purpose other than this could have been served by the city, for in no event would it have been liable therefor. The evident object was to secure subcontractors to the end that knowing 'they were secured, would do better work and furnish better material than if they felt uncertain about their pay.' "

See also cases cited at 77 A.L.R. 141 and following.

The Supreme Court of Arizona has placed its reliance on the Indiana decision in *Knight & Jillson Co. v. Castle* in holding that a contract and bond for the payment of materialmen and laborers permits recovery by a materialman to a subcontractor. The decision of the Indiana court expressly holds that a contractual undertaking by a general contractor, in all material respects identical to the contract in the case at bar, is a promise to pay materialmen and laborers. When the Indiana and Arizona cases are laid side by side, they require the conclusion that the Supreme Court of Arizona would allow recovery to American Radiator against Forbes in this action.

II.

NOTWITHSTANDING ANY ATTEMPTS ON THE PART OF THE BONDING COMPANY TO RESTRICT ITS LIABILITY TO THE INDEMNIFICATION OF THE SCHOOL DISTRICT, THE BOND IS IN LAW A PERFORMANCE BOND IMPOSING LIABILITY ON THE BONDING COMPANY FOR ANY DEFAULT BY FORBES IN THE OBLIGATIONS OF THE CONTRACT.

The Bonding Company seeks to be relieved of liability by reliance upon two escape clauses which have been written into the bond (App. xiii). They are (1) that the condition of the bond is only that the Bonding Company shall indemnify the named obligee (the School District), and (2) that the instrument does not give to third parties the right to sue on it but undertakes expressly to deny to them that right.

Although neither question has been directly passed upon by the Supreme Court of Arizona, we believe that the tenor of its decisions, together with the better reasoned decisions in other jurisdictions, indicates that it would hold each of these escape clauses invalid under the circumstances here presented. At the outset, Arizona has expressly recognized the modern rule that a contract of suretyship made by a surety engaged in that business for profit will be construed most strongly against the surety and in favor of the person or persons for whose benefit the contract has been made. *Massachusetts Bonding Company v. Lentz,* 40 Ariz. 46, 9 P.2d 408.

The bond in this case was furnished in accordance with the provisions of § 10-610 of the 1939 Arizona Code as amended. The section has been reproduced in

full commencing at page xii of the appendix to this brief. It provides in part as follows:

> "If a bid be accepted, said body or board (the Board of Supervisors) shall require the successful bidder to enter into a written contract for the erection and completion of said buildings and the furnishing thereof, and require from him a bond in the amount of the contract, *conditioned upon the faithful performance of the contract, such bond to be approved by the body or board.*" (Parenthetical matter and emphasis supplied.)

The parties stipulated and the court found that the bond was a contract bond as required by § 10-610 (R. 15-23). It is a familiar rule that any undertaking of a contractual nature which purports to have been made in compliance with and for the purpose of qualifying under a provision of law is deemed to contain the minimum obligations established by that law and express provisions in the undertaking which conflict are regarded as being void. This rule has been expressly applied to surety bonds filed in purported compliance with the provisions of statutes relating to construction contracts for public works.

In *Baumann v. City of West Allis,* 187 Wis. 506, 204 N. W. 907, the surety sought to avoid liability on the ground that its bond was a performance bond only and the contract contained no express promise to pay materialmen. The Supreme Court of Wisconsin, first reviewing the requirements of its statutes concerning bonds for public works, said (p. 914 of 204 N. W.):

> "It is the contention of appellants that the liability sought to be imposed by the statute does not

arise unless the provision required by the statute is actually inserted in the contract. If this construction is correct, then the relief which the Legislature attempted to afford subcontractors and materialmen is very much like sounding brass. The remedy which the Legislature intended to extend may, under such a construction, be defeated if the parties to the contract do not insert the prescribed provision, and whether the remedy is available to subcontractors and materialmen depends, not upon the law, but upon the parties to the contract. If this be the proper construction of the law, then the statute might just as well not have been passed, because such was the law before. Such a statute will be construed in the light of the conditions and circumstances which gave rise to the law, and to effectuate the purpose which the Legislature sought to accomplish. Having discovered that purpose, the law should be construed to give effect thereto. We entertain no doubt that it was the purpose of the Legislature to afford a remedy, in the nature of an action against the surety, to all subcontractors furnishing labor or material entering into the construction of public buildings and public works mentioned in the section of the statutes. This purpose may not be defeated by the voluntary act or by the oversight of the parties in failing to insert such a provision in the contract. The law imputes such provision to the contract whether written therein or not. The liability is one arising by virtue of the law, independent of the contract. Like the law providing for a standard fire insurance policy, it is both a law and a contract."

And in *City of Portland v. New England Casualty Co., supra,* 152 Pac. at 254:

> "The rights of the plaintiffs and the defendants are measured in accordance with the statutory bond required. In the execution of such an instrument the parties thereto are presumed to have had notice of and taken into consideration and understood the statute authorizing the same. The provisions of the act are practically made a part of the bond, just as though they were incorporated therein."

See also *Guaranteed Gravel & S. Co. v. Aetna Casualty & S. Co.,* 174 Minn. 366, 219 N.W. 546.

As will be seen from these decisions the courts have forbidden the parties to change the law or limit the obligations which it imposes by private contract. By undertaking to furnish a bond, regardless of its form, the Bonding Company, as a matter of law, guaranteed the faithful performance of each of the covenants of the contract between Forbes and the School District. The Bonding Company in the capacity of surety contracted for liability precisely coextensive with the liability assumed by Forbes in the execution of the principal contract. If, as we have undertaken to demonstrate above, Forbes is liable to American Radiator under the construction contract, the Bonding Company must respond to the same liability if Forbes does not.

The second attempted escape is under the supposed protection of the clause which denies to any person other than the named obligee the right to institute pro-

ceedings and recover on the bond. Here again the better reasoned cases hold such an attempted limitation of remedies invalid. The theory upon which these decisions rest is that it is contrary to public policy to require a performance bond running to the benefit of laborers and materialmen and at the same time to deny to those persons judicial relief to enforce the right which has been granted to them. Some of the cases are collected in the annotation in 77 A.L.R. commencing at page 171. We think the following language from Judge Parker's decision in *Maryland Casualty Company v. Fowler,* 4 Cir., 31 F.2d 881, 63 A.L.R. 1375 commends itself to adoption:

> "It is argued that the provision of the bond to the effect that no right of action shall accrue upon or by reason of it to any person other than the obligee, precludes the right of anyone else to recover thereunder. But, as the claims of laborers and materialmen were protected by the bond, this provision, insofar as it affects them, is void, because contrary to the public policy of the state as expressed in § 2445 of the Consolidated Statutes."

The Supreme Court of Iowa took a more pragmatic approach in *Hipwell v. National Surety Co., supra* (105 N.W. at 320):

> "It is contended, however, that, even if this paragraph be so construed, all liability to subcontractors is obviated by a subsequent provision that 'it is the express condition of this contract that no member of said committee, or other person, whose name is not at this time disclosed, shall be admitted to any share of this contract, or to any

> benefit to arise therefrom; and it is further covenanted and agreed that this contract shall not be assigned.' That is, under the construction contended for the parties, after specifically agreeing that payment shall be promptly made for labor and materials, they then stipulated that none other than those named shall derive any benefit therefrom. It seems all but inconceivable that after recognizing that labor and materials must be bought by the contractor, and obligating him to promptly pay therefor, that this paragraph was intended to exclude those furnishing them from 'any share of this contract or to any benefit arising therefrom.' Just how such a feat, paying without conferring a benefit, may be performed, is not explained."

See also the supplemental annotation in 118 A.L.R. at page 86 and following.

One other defense which was asserted by the Bonding Company but which was not expressly made the subject of a finding or conclusion by the District Court is the provision of Paragraph Sixth of the bond requiring suit to be brought thereon within six months after the completion of the contract. Attempts to establish limitations other than the applicable Statute of Limitations are prohibited by the Arizona Insurance Code, A. R. S. § 20-1115, and the decision of the state Supreme Court in *Massachusetts Bonding Company v. Lentz, supra.*

It is, of course, true that the bond does not contain any express agreement to pay the claims of laborers

and materialmen. The detailed obligations of the general contractor are set forth in his written contract which in this case must be construed as an agreement to pay a materialman supplying materials to a subcontractor. It is, however, of no consequence whether the undertaking to pay materialmen is found in the bond or is found only in the contract, the performance of which the bond guarantees. The contract and bond must be read together to determine the extent of the surety's liability. *Hartford Accident and Indemnity Company v. Board of Education,* 4 Cir., 15 F.2d 317; *First National Bank v. Caples,* 5 Cir., 17 F.2d 87. See cases collected in 77 A.L.R. at page 96 where the annotator says:

> "And if a public contractor's bond conditioned for the faithful performance of the contract, and the contract and specifications or other papers made a part of the contract, fairly construed together, show an obligation on the part of the contractor to pay persons furnishing materials, the materialman may sue and recover on the bond."

Here, again, no valid distinction can be made between suppliers to the general contractor and those who furnish materials to a subcontractor. The cases which we have cited in respect to Forbes' liability apply without discrimination to both the principal and the surety whose liability is necessarily coextensive with that of the contractor. See annotations in 70 A.L.R. 308 and 111 A.L.R. 311. Indeed, the District Court's decision does not purport to rest upon any such supposed distinction. Conclusions of Law

Nos. IV and V hold that the Bonding Company, with complete disregard for the statute, has lawfully limited its undertaking to that of indemnification of the named obligee, and no one else, not even a direct supplier to Forbes, may invoke the protection of the bond (R. 26).

In summary, it is our position that the bond, being furnished in purported compliance with the statute, is conditioned on the faithful performance of the contract by Forbes, that Forbes agreed to pay all materialmen, including suppliers to his subcontractors, that any attempts on the part of the Bonding Company to deny to materialmen the right to sue on the bond are void and that the Bonding Company is liable to the same extent as Forbes.

III.

BY ACCEPTING THE FINAL RETENTION FUND WITHOUT FURNISHING TO THE SCHOOL DISTRICT A SATISFACTORY RECEIPT FOR THE MATERIALS SUPPLIED BY AMERICAN RADIATOR, FORBES BECAME A CONSTRUCTIVE TRUSTEE OF THE FUND FOR THE BENEFIT OF AMERICAN RADIATOR.

Section 10-610 (App. xii) contains certain specific restraints on the final release of the balance of the contract price to the contractor after completion of the building. They are:

1. That 10% of all estimates shall be retained by the Board of Supervisors "as guarantee of the complete performance of the contract", and

2. That this 10% retention fund shall be paid to the contractor on the happening of both of the following events:

(a) That 65 days have elapsed after completion of the contract.

(b) That the contractor has duly furnished to the Board of Supervisors "satisfactory receipts for all labor and material bills and waivers of liens from any and all persons holding claims against the work".

The record discloses that the 10% retention fund was paid by the Board of Supervisors to Forbes notwithstanding the following circumstances which existed at the time of payment:

1. Forbes had not completely performed the contract, in that he had not paid for all materials required for the job.

2. Prior to the expiration of 65 days from the completion of the building, Forbes and the School District had received written notice that American Radiator had not been paid.

3. Neither before the release of the retention fund nor at any time thereafter did Forbes ever furnish to the Board of Supervisors or the School District any satisfactory receipt from American Radiator for the material supplied by it nor a waiver of lien.

As we have observed in the first part of this argument, (p. 19) neither the Board of Supervisors nor

the School District is liable for unpaid bills for materials furnished for the construction work. The public buildings and the land on which they stand are, of course, immune to materialmen's liens. In consequence, it is apparent that the requirement that 10% of the contract price be retained until the contractor has furnished receipts for material and waivers of liens could not have been designed to protect the public bodies or the public property. It is equally apparent that the only persons who might be the beneficiaries of the statutory restraints on the release of the retention fund are the persons who perform the labor and furnish the materials.

In his Admission of Facts, Forbes admitted that he never furnished to the Supervisors a receipt from American Radiator but added that it was not necessary for him to furnish such receipts or waivers of lien from American Radiator, inasmuch as he did in fact furnish to the Supervisors receipts from the plumbing subcontractor to whom American Radiator furnished the plumbing materials (R. 19). This is, of course, a distortion of the language of the statute. A receipt for a material bill signed by any person other than the vendor of the material is not "satisfactory". The only kind of a receipt which is "satisfactory" is one which constitutes evidence of payment to that person who is entitled to receive payment. Since payment to the plumbing subcontractor does not constitute satisfaction of the claim of American Radiator, a receipt signed by the subcontractor is no receipt at all.

We think that further evidence of the intention of the legislature to insist upon receipts from those persons entitled to payment is to be found in the alternate requirement that the contractor shall provide waivers of liens from any and all persons holding claims against the work. Clearly, a subcontractor could not waive a lien which a materialman would be entitled to assert if the public structure were subject to such liens. Clearly, a waiver purported to be signed by a subcontractor could not prohibit his materialman from successfully filing and foreclosing a lien for materials actually incorporated in the structure. We think that the statute read as a whole compels the interpretation that a Board of Supervisors may not lawfully pay nor may the general contractor lawfully receive the final 10% of the contract unless the general contractor has furnished to the Board a satisfactory receipt executed by every person who would be in a position to perfect a laborer's or materialman's lien if the property were not in public ownership. Any other construction would strip laborers and materialmen of the minimum protection available to them on public jobs.

Additionally, the statute requires that the retention fund be held as a "guarantee of the complete performance of the contract. . . ." As we have seen, the contract required Forbes to pay for all labor and materials. Until he had discharged that obligation, together with all the other obligations of the contract, the retention fund stood as a guarantee against his default and could not lawfully be paid to him.

The conclusion is therefore inescapable that when the Board of Supervisors as agent for the School District paid the final retention fund to Forbes, it paid and Forbes accepted the fund in violation of express statutory restraints.

It is, of course, true that the Supervisors, the Trustees of the School District and the District itself were joined as defendants in this action and that the court, upon their motion, dismissed the complaint as to them. Appellees will contend that this dismissal was a ruling by the District Court that the payment of the retention fund was not in violation of any of the provisions of § 10-610. We took no appeal from the order of dismissal and we have no quarrel with it. It is fully justified upon the doctrine that an action will not lie against the body politic or the members of its governing board for acts in violation of express statutory inhibitions unless the right to maintain such an action is expressly granted by statute. Precisely in point is the following quotation from 44 Corpus Juris at p. 414 upon which the County Attorney relied in urging his motion to dismiss as to the Supervisors and School authorities:

> "While a person who has . . . furnished materials to . . . a contractor for a municipal improvement may in a proper case recover a personal judgment against the contractor, he has no claim or right of action against the municipality unless the case is brought within an applicable statute imposing liability. . . ."

Surely the order of dismissal could not, in the face of the statutory language, have constituted a finding

by the trial Court that the contractor had complied with all of the provisions of the law. It simply meant that the departure from the statutory restraints did not give rise to a cause of action against the public authorities.

Clearly, Forbes took the final 10% in violation of the law. Clearly, he held it as a guarantee of the complete performance of his contract. The fund came into his hands impressed with a constructive trust for the benefit of those persons whom the legislature intended to protect. This is in substance the conclusion which was reached by the Court of Appeals of Colorado in *Western Lumber & Pole Co. v. City of Golden,* 23 Colo. App. 461, 130 Pac. 1027. The Colorado statute contained a provision requiring a City Council to retain funds for the payment of claims of materialmen and laborers. In violation of this restraint the City Council of the City of Golden released the retention fund when there were unsatisfied materialmen's claims. The court held that by the statute the city was made the agent or trustee for the unpaid claimant and that the fund in the hands of the city was impressed with a trust in his favor. The court said (at p. 1029 of 130 Pac.):

> "By section 5406, in the most unequivocal language, the trustee created by the statute, namely, the city in this case, is enjoined to withhold the payment of money due the contractor, and the purpose for which it is to be withheld is clearly expressed: 'To satisfy the claim of laborers,' etc. *Section 5407, in language requiring no interpretation, positively forbids payment by the city to*

> *the contractor until he shall have done the things imposed upon him by the statute;* and this no matter what the terms of the contract between the city and the contractor may be." (Emphasis supplied.)

Under the provisions of § 10-610 the Board of Supervisors held the retention fund as a guarantee for the performance of the contract. Article 3 of the General Conditions of the contract required the contractor to pay for all materials. The legal effect of the statute was that the fund was held by the Board of Supervisors as a guarantee for the payment of material bills, including the bill presented by American Radiator. In consequence, the Board of Supervisors held the fund as trustee for unpaid materialmen, including American Radiator.

Surely, if the fund was impressed with a trust while it was in the hands of the Board of Supervisors, the trust followed the fund into the hands of the contractor who received it in violation of the law.

CONCLUSION.

The judgment of the District Court has in practical consequence effectively frustrated the aims and purposes of the Arizona statute. It has thrown upon the laborer and the materialman the risk of the insolvency of the subcontractor. Inevitably, if such materialmen and laborers are deprived of any protection from the statutory undertakings of the general contractor and

his surety, their only recourse is to hedge anticipated losses either by increasing the price of their services and materials or stinting on quality. The Supreme Court of the United States sees this as a matter of public concern.

> "The public is concerned not merely because laborers and materialmen (being without the benefit of a mechanics' lien in the case of public buildings) would otherwise be subject to great losses at the hands of insolvent or dishonest contractors, but also because the security afforded by the bond has a substantial tendency to lower the prices at which labor and material will be furnished, because of the assurance that the claims will be paid." *Equitable Surety Co. v. United States,* 234 U.S. 448, 58 L. Ed. 1394, 34 S. Ct. 803, 805.

The judgment of the District Court should be reversed and the cause remanded with instructions to enter judgment in favor of the plaintiff upon a proper showing of the value of the materials furnished.

Dated, Phoenix, Arizona,
October 18, 1957.

Respectfully submitted,
PHILIP E. VON AMMON,
Attorney for Appellant.

FENNEMORE, CRAIG, ALLEN & MCCLENNEN,
Of Counsel.

(Appendix Follows.)

Appendix.

Appendix

THE A.I.A. SHORT FORM FOR SMALL CONSTRUCTION CONTRACTS

AGREEMENT AND GENERAL CONDITIONS BETWEEN CONTRACTOR AND OWNER

ISSUED BY THE AMERICAN INSTITUTE OF ARCHITECTS FOR USE ONLY WHEN THE PROPOSED WORK IS SIMPLE IN CHARACTER, SMALL IN COST, AND WHEN A STIPULATED SUM FORMS THE BASIS OF PAYMENT, FOR OTHER CONTRACTS THE INSTITUTE ISSUES THE STANDARD FORM OF AGREEMENT BETWEEN CONTRACTOR AND OWNER FOR CONSTRUCTION OF BUILDINGS AND THE STANDARD GENERAL CONDITIONS IN CONNECTION THEREWITH FOR USE WHEN A STIPULATED SUM FORMS THE BASIS FOR PAYMENT.

THIS AGREEMENT made the *30th* day of *September* in the year Nineteen Hundred and *fifty-four,* by and between *L. L. FORBES CONSTRUCTION COMPANY, A Partnership,* hereinafter called the

Contractor, and *BOARD OF SUPERVISORS OF MARICOPA COUNTY, ARIZONA, ACTING FOR GLENDALE UNION HIGH SCHOOL DISTRICT* hereinafter called the Owner.

WITNESSETH, That the Contractor and the Owner for the consideration hereinafter named agree as follows:

Article 1. Scope of the Work—The Contractor shall furnish all of the material and perform all of the work for *Gymnasium, Classroom Additions and Bus Garage*
(Caption indicating the portion or portions of work covered)
as shown on the drawings and described in the specifications entitled

A Gymnasium Building for Sunnyslope High School, Glendale Union High School District, Maricopa County, Sunnyslope, Arizona, by Edward L. Varney Architects, Inc., and Classroom Additions to Sunnyslope High School, by John Sing Tang.

prepared by *EDWARD L. VARNEY ARCHITECTS, INC.-JOHN SING TANG* Architects all in accordance with the terms of the contract documents.

Article 2. Time of Completion—The work shall be substantially completed *within 180 days after the date of the contract.*

Article 3. Contract Sum—The Owner shall pay the Contractor for the performance of the contract subject to the additions and deductions provided therein in

current funds, the sum of *TWO HUNDRED FIFTY-SIX THOUSAND SEVEN HUNDRED EIGHT & NO/100 dollars. ($256,708.00)*

Article 4. Progress Payments—The Owner shall make payments on account of the contract, upon requisition by the Contractor, as follows:

On the first of every month, the Contractor shall be paid the amount of work in place, less the aggregate of prior payments, and less 10% which amount will be retained for final payment. These payments shall be made on the certificates of the Architects only.

Article 5. Acceptance and Final Payment—Final payment shall be due *10* days after completion of the work, provided the contract be then fully performed, subject to the provisions of Article 16 of the General Conditions.

Article 6. Contract Documents—Contract documents are as noted in Article 1 of the General Conditions. The following is an enumeration of the drawings and specifications:

Drawings:	GA1, 2, 3, 4, 5, GS1, 2, GE1	By Edward L. Varney Architect, Inc.
Specifications:	Sections I, II, III, Addendum # 1	
Drawings:	A1 thru A11, S1, 2,3; M1, 2, E1, E2, P1, 2, 3	By John Sing Tang
Specifications:	73 pages, Addenda 1, 2, 3 and 3 Addenda Drawing Sheets	

All as applicable to Base Bid 3 of the Bid Form.

GENERAL CONDITIONS

Article 1. Contract Documents—The contract includes the Agreement and its General Conditions, the Drawings, and the Specifications. Two or more copies of each, as required, shall be signed by both parties and one signed copy of each retained by each party.

The intent of these documents is to include all labor, materials, appliances and services of every kind necessary for the proper execution of the work, and the terms and conditions of payment therefor.

The documents are to be considered as one, and whatever is called for by any one of the documents shall be as binding as if called for by all.

Article 2. Samples—The Contractor shall furnish for approval all samples as directed. The work shall be in accordance with approved samples.

Article 3. Materials, Appliances, Employes—Except as otherwise noted, the Contractor shall provide and pay for all materials, labor, tools, water, power and other items necessary to complete the work.

Unless otherwise specified, all materials shall be new, and both workmanship and materials shall be of good quality.

All workmen and sub-contractors shall be skilled in their trades.

Article 4. Royalties and Patents—The Contractor shall pay all royalties and license fees. He shall defend all suits or claims for infringement of any patent

rights and shall save the Owner harmless from loss on account thereof.

Article 5. Surveys, Permits, and Regulations—The Owner shall furnish all surveys unless otherwise specified. Permits and licenses of a temporary nature necessary for the prosecution of the work shall be secured and paid for by the Contractor. Permits, licenses and easements for permanent structures or permanent changes in existing facilities shall be secured and paid for by the Owner, unless otherwise specified. The Contractor shall comply with all laws and regulations bearing on the conduct of the work and shall notify the Owner if the drawings and specifications are at variance therewith.

Article 6. Protection of Work, Property, and Persons—The Contractor shall adequately protect the work, adjacent property and the public and shall be responsible for any damage or injury due to his act or neglect.

Article 7. Inspection of Work—The Contractor shall permit and facilitate inspection of the work by the Owner and his agents and public authorities at all times.

Article 8. Changes in the Work—The Owner may order changes in the work, the Contract Sum being adjusted accordingly. All such orders and adjustments shall be in writing. Claims by the Contractor for extra cost must be made in writing before executing the work involved.

Article 9. Correction of Work—The Contractor shall re-execute any work that fails to conform to the requirements of the contract and that appears during the progress of the work, and shall remedy any defects due to faulty materials or workmanship which appear within a period of one year from the date of completion of the contract. The provisions of this article apply to work done by subcontractors as well as to work done by employes of the Contractor.

Article 10. Owner's Right to Terminate the Contract—Should the Contractor neglect to prosecute the work properly, or fail to perform any provision of the contract, the Owner, after seven days' written notice to the Contractor, may, without prejudice to any other remedy he may have, make good the deficiencies and may deduct the cost thereof from the payment then or thereafter due the Contractor or, at his option, may terminate the contract and take possession of all materials, tools, and appliances and finish the work by such means as he sees fit, and if the unpaid balance of the contract price exceeds the expense of finishing the work, such excess shall be paid to the Contractor, but if such expense exceeds such unpaid balance, the Contractor shall pay the difference to the Owner.

Article 11. Contractor's Right to Terminate Contract—Should the work be stopped by any public authority for a period of thirty days or more, through no fault of the Contractor, or should the work be stopped through act or neglect of the Owner for a period of seven days, or should the Owner fail to

pay the Contractor any payment within seven days after it is due, then the Contractor upon seven days' written notice to the Owner, may stop work or terminate the contract and recover from the Owner payment for all work executed and any loss sustained and reasonable profit and damages.

Article 12. Payments—Payments shall be made as provided in the Agreement. The making and acceptance of the final payment shall constitute a waiver of all claims by the Owner, other than those arising from unsettled liens or from faulty work appearing thereafter, as provided for in Article 9, and of all claims by the Contractor except any previously made and still unsettled. Payments otherwise due may be withheld on account of defective work not remedied, liens filed, damage by the Contractor to others not adjusted, or failure to make payments properly to subcontractors or for material or labor.

Article 13. Contractor's Liability Insurance—The Contractor shall maintain such insurance as will protect him from claims under workmen's compensation acts and from claims for damages because of bodily injury, including death, which may arise from and during operations under this contract, whether such operations be by himself or by any subcontractor or anyone directly or indirectly employed by either of them. This insurance shall be written for not less than any limits of liability specified as part of this contract. This insurance need not cover any liability imposed by Article 6 of the General Conditions. Certificates of such insurance shall be filed with the Owner if he so require.

Article 14. Owner's Liability Insurance—The Owner shall be responsible for and at his option may maintain such insurance as will protect him from his contingent liability to others for damages because of bodily injury, including death, which may arise from operations under this contract, and any other liability for damages which the Contractor is required to insure under any provision of this contract.

Article 15. Fire Insurance—The Owner shall effect and maintain fire insurance upon the entire structure on which the work of this contract is to be done to one hundred per cent of the insurable value thereof, including items of labor and materials connected therewith whether in or adjacent to the structure insured, materials in place or to be used as part of the permanent construction including surplus materials, shanties, protective fences, bridges, or temporary structures, miscellaneous materials and supplies incident to the work; and such scaffoldings, stagings, towers, forms, and equipment as are not owned or rented by the contractor, the cost of which is included in the cost of the work. Exclusions: This insurance does not cover any tools owned by mechanics, any tools, equipment, scaffoldings, stagings, towers, and forms owned or rented by the Contractor, the capital value of which is not included in the cost of the work, or any cook shanties, bunk houses or other structures erected for housing the workmen. The loss, if any, is to be made adjustable with and payable to the Owner as Trustee for the insureds as their interests may appear, except in such cases as may require payment of

all or a proportion of said insurance to be made to a mortgagee as his interests may appear.

The Contractor and all sub-contractors shall be named or designated in such capacity as insured jointly with the Owner in all policies, all of which shall be open to the Contractor's inspection. Certificates of such insurance shall be filed with the Contractor if he so requires. If the Owner fails to effect or maintain insurance as above and so notifies the Contractor, the Contractor may insure his own interest and that of the sub-contractor and charge the cost thereof to the Owner. If the Contractor is damaged by failure of the Owner to maintain such insurance or to so notify the Contractor, he may recover as stipulated in the contract for recovery of damages. If extended coverage or other special insurance not herein provided for is required by the Contractor, the Owner shall effect such insurance at the Contractor's expense by appropriate riders to his fire insurance policy.

If required in writing by any party in interest, the Owner as Trustee shall, upon the occurrence of loss, give bond for the proper performance of his duties. He shall deposit any money received from insurance in an account separate from all his other funds and he shall distribute it in accordance with such agreement as the parties in interest may reach, or under an award of arbitrators appointed, one by the Owner, another by joint action of the other parties in interest, all other procedure being as provided elsewhere in the contract for Arbitration. If after loss no special agree-

ment is made, replacement of injured work shall be ordered and executed as provided for changes in the work.

The Trustee shall have power to adjust and settle any loss with the insurers unless one of the Contractors interested shall object in writing within three working days of the occurrence of loss, and thereupon arbitrators shall be chosen as above. The Trustee shall in that case make settlement with the insurers in accordance with the directions of such arbitrators, who shall also, if distribution by arbitration is required, direct such distribution.

Article 16. Liens—The final payment shall not be due until the Contractor has delivered to the Owner a complete release of all liens arising out of this contract, or receipts in full covering all labor and materials for which a lien could be filed, or a bond satisfactory to the Owner indemnifying him against any lien.

Article 17. Separate Contracts—The Owner has the right to let other contracts in connection with the work and the Contractor shall properly cooperate with any such other contractors.

Article 18. The Architect's Status—The Architect shall have general supervision of the work. He has authority to stop the work if necessary to insure its proper execution. He shall certify to the Owner when payments under the contract are due and the amounts to pe paid. He shall make decisions on all claims of the Owner or Contractor. All his decisions are subject to arbitration.

Article 19. Arbitration—Any disagreement arising out of this contract or from the breach thereof shall be submitted to arbitration, and judgment upon the award rendered may be entered in the court of the forum, state or federal, having jurisdiction. It is mutually agreed that the decision of the arbitrators shall be a condition precedent to any right of legal action that either party may have against the other. The arbitration shall be held under the Standard Form of Arbitration Procedure of The American Institute of Architects or under the Rules of the American Arbitration Association.

Article 20. Cleaning Up—The Contractor shall keep the premises free from accumulation of waste material and rubbish and at the completion of the work he shall remove from the premises all rubbish, implements and surplus materials and leave the building broom-clean. In Witness Whereof the parties hereto executed this Agreement, the day and year first above written.

L. L. Forbes Construction Company
Contractor A. W. Bodine, Partner
Board of Supervisors of Maricopa County, Arizona, acting for Glendale Union High School District
Owner James G. Harth, Chairman
Attest:—4—
Marguerite Trujillo
Actg. Clerk

Section 10-610, Arizona Code Annotated—1939. *Erection of buildings for which bonds voted—Method of payment*—If such bonds are issued for the purpose of erecting and furnishing any public building, the board of supervisors, for a county or school district, and the governing body of a city, town, or other municipal corporation, shall adopt plans and specifications for such building and as soon as practicable thereafter, advertise for bids for the erection and furnishing of said building, stating a day and hour, not less than forty [40] days from the date of such notice, when said bids shall be received and opened. The governing body or board shall award the contract to the lowest and most responsible bidder, but any and all bids submitted may be rejected. If a bid be accepted, said body or board shall require the successful bidder to enter into a written contract for the erection and completion of said buildings and the furnishing thereof, and require from him a bond in the amount of the contract, conditioned upon the faithful performance of the contract, such bond to be approved by the body or board. Such body or board may agree to pay the contractor in semi-monthly or monthly payments as may be authorized by law or by mutual agreement, to be due and paid to the contractor upon a basis of ninety [90] per cent of the value of the work actually performed as estimated by the architect or superintendent up to and including the 15th or last day of each calendar month; ten [10] per cent of all estimates shall be retained by the agent as guarantee of the complete performance of the contract, to be paid to the

contractor within sixty-five [65] days after completion, or filing of notice of completion, or [of] the contract, provided the contractor has duly furnished the agent satisfactory receipts for all labor and material bills and waivers of liens from any and all persons holding claims against the work. Such contract shall be signed by the agent and the contractor. If it is necessary to purchase a building site, the call for the election shall state the amount to be expended therefor.

The Home Indemnity Company
Home Office—New York

CONTRACT BOND

Bond No. N 197022

Know All Men By These Presents:

That L. L. Forbes Construction Company, A Partnership of Phoenix, Arizona, (hereinafter called the Principal), and The Home Indemnity Company (hereinafter called the Surety), are held and firmly bound unto Board of Supervisors of Maricopa County, Arizona acting for Glendale Union High School District of Maricopa County, Arizona (hereinafter called the Obligee), in the sum of Two Hundred Fifty-Six Thousand Seven Hundred Eight and 00/100 Dollars ($256,708.00), for the payment whereof said Principal and Surety Bind themselves firmly by these presents.

Whereas, The Principal has entered into a written contract dated the 30th day of September, 1954, with the Obligee for a gymnasium building for Sunnyslope High School, Glendale Union High School District,

Maricopa County, Sunnyslope, Arizona by Edward L. Varney Architects, Inc., and classroom additions to Sunnyslope High School by John Sing Tang, which contract, subject to the conditions and provisions herein set forth, is made a part hereof for the purpose of explaining this obligation:

Now, Therefore, The condition of this obligation is such that if the Principal shall indemnify the Obligee against loss or damage directly caused by the failure of the Principal to faithfully perform said contract, then this obligation shall be void; otherwise to remain in full force and effect.

Provided, however, and upon the *Express Conditions* the performance of each of which shall be a condition precedent to any right of recovery hereon:

FIRST: That in the event of any default on the part of the Principal, a written statement of the particular facts showing such default and the date thereof shall be delivered to the Surety, by registered mail, at its office in New York, New York, promptly and in any event within ten (10) days after the Obligee or his representative, or the Architect, if any, shall learn of such default; and if the Principal abandons said contract or is lawfully compelled by reason of a default to cease operations thereunder the Surety shall have the right within thirty (30) days after the receipt of notice from the Obligee that the Principal has ceased operations under the contract to proceed, or procure others to proceed, with the performance of such a contract as if no default or abandonment had

occurred, and in such event all moneys or property due or to become due under said contract shall as the same become due and payable under the terms of the contract to be paid to the Surety; but if the Obligee completes or relets the contract, all moneys or property provided by the contract to be paid to the Principal, had the Principal faithfully performed said contract, shall be credited upon any claim against the Surety, and the surplus, if any, applied as the Surety may direct.

SECOND: That the Obligee shall faithfully perform all the terms, covenants and conditions of such contract on the part of the Obligee to be performed; and shall also retain that proportion, if any, which such contract specifies the Obligee shall or may retain of the value of all work performed or materials furnished in the prosecution of such contract (not less however, in any event, than ten per centum of such value), until the complete performance by the Principal of all the terms, covenants and conditions of said contract on the Principal's part to be performed.

THIRD: That the plans and specifications mentioned in said contract are not in any respect defective, and are and at all times will be kept adequate for the complete performance of such contract, and that no change shall be made in such plans and specifications which shall increase the amount to be paid to the Principal more than ten per centum of the penalty of this instrument, without the written consent of the Surety.

FOURTH: That the Surety shall not be liable for any loss or damage resulting from so-called strikes or labor difficulties, or from mobs, riots, fire, the elements, civil commotion, or acts of God, or the public enemies, or for the repair or reconstruction of any work or materials damaged or destroyed by any such causes; nor for loss or damages from injury to or death of persons; nor for patent infringement; nor for non-performance of any guarantees of the efficiency or wearing qualities of any work done or materials furnished or the maintenance thereof or repairs thereto; nor for the furnishing of any bond or obligation other than this instrument; nor for damages caused by delay in finishing such contract in excess of ten per centum of the penalty of this bond.

FIFTH: That no right of action shall accrue upon or by reason hereof to or for the use of anyone other than the Obligee herein named; that the obligation of the Surety is, and shall be construed strictly as, one of suretyship only; that this bond shall be executed by the Principal before delivery, and shall not, nor shall any interest therein, or right of action thereon, be assigned without the prior consent in writing of the Surety, over the signature of its president or vice-president, attested by its secretary or assistant secretary; nor shall any of the conditions or provisions contained herein be deemed waived or altered by the Surety unless the written consent to such waivers or alteration be duly executed by its president or vice-president and attested as aforesaid.

SIXTH: That no action, suit or proceeding shall be had or maintained against the Surety on this instrument unless the same be brought or instituted and process served upon the Surety within six months after the completion of the said contract and in any event within twelve (12) months from the date fixed in said contract for completion, and if no time for completion is specified in said contract, after eighteen months from the date of this bond; that the Principal shall be made a party to any such suit or action, and be served with process commencing the same if the Principal can with reasonable diligence be found; and that no judgment shall be rendered against the Surety in excess of the penalty of this bond. If any limitation set forth in this condition is prohibited by the statutes of the state in which this bond is issued, the said limitation shall be considered to be amended to agree with the minimum period of limitation permitted by such statutes.

Signed and Sealed this 30th day of September, 1954.

L. L. Forbes Construction Company

s/ A. W. Bodine (Seal)

Principal

A. W. Bodine, Partner

In the Presence of:

The Home Indemnity Company

Surety (Seal)

By s/ Frank Distal

Attorney-in-Fact

State of .....)
) ss.
County of .....)

Individual—Principal

On this.....day of....., 19.....
before me personally appeared the within named
.....to me known, and known
to me to be..... the individual
described in and who executed the within bond, and
.....acknowledged to me that.....he.....
executed the same.

.....
Notary Public
County.

State of Arizona)
) ss.
County of Maricopa)

Firm—Principal

On this 30th day of September, 1954, before me personally appeared A. W. Bodine a member of the firm of L. L. Forbes Construction Company to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same as and for the act and deed of the said firm.

s/ Lola E. Davis

Notary Public
County.
My Commission Expires Mar. 1, 1957

County of .....)
) ss.
State of .....)

Corporation—Principal

On this.....day of....., 19.....
before me personally appeared.....
with whom I am personally acquainted, who, being by me duly sworn, did depose and say:
That he resides at.....that he is the.....
of the..... the corporation described in and which executed the foregoing instrument; that he knows the corporate seal of said corporation; that the seal thereto affixed is such corporate seal. that it was so affixed by order of the Board of Directors, and that he signed his name thereto by like order.

.....
Notary Public
County.